

MINUTES
REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS
Monday, May 17, 2004, at 9:00 a.m.
State Capitol Building, Room 303

PRESENT: Lt. Governor Karl Ohs, Superintendent of Public Instruction Linda McCulloch, State Auditor John Morrison, and Attorney General Mike McGrath

VIA PHONE: Secretary of State Bob Brown

Motion was made by Mr. Morrison to approve the minutes from the regularly scheduled meeting of the Board of Land Commissioners held April 19, 2004. Seconded by McGrath. Motion carried unanimously.

BUSINESS TO BE CONSIDERED

504-1 APPROVAL OF COMPETITIVE BID HEARINGS

Mr. Clinch said each year the department renews 10% of its agricultural and grazing leases. Statute provides that if they are competitively bid, and the lessee so desires, he can meet the high bid. Statute further delineates that if that high bid is above community standards or would cause long term harm to the tract, he may request a hearing before the director. This year I received 17 such requests and held those hearings in April. Before the Board today is the my recommendation on those 17 competitive bid hearings. Everyone at the end of the hearing was made aware of the process, they were able to call in later in the week and learn the department's recommendation, and given an opportunity to appear before the Land Board today to appeal as to why the Board would accept, deny, or modify the director's recommendation. There are several people here that would like to appeal that recommendation. Mr. Clinch said Courtney and Pam Ayers are here, the very first lease on our list, Mr. Almy is here as the high bidder on the Ayer's lease. Mr. Victor Demaio is here. He suggested that with the exception of Leases #4340 and #4674, Ayers and Demaio respectively, the Board could take action on the remaining 15 in the package. It could then come back and hear each party on their individual leases.

Lt. Governor Ohs asked if there was any member of the public who would like to comment on the remainder 15 leases?

Motion was made by Mr. Morrison to approve the findings and recommendations of the department with respect to the leases contained in 504-1, with the exception of Lease #4340, Ayers, and Lease #4674, Demaio. Seconded by Ms. McCulloch. Motion carried unanimously.

Mr. McGrath asked the department to address the Ecker lease for the Board because it was reduced below the current lease, in terms of 1/3 crop share.

Kevin Chappell, DNRC, said this lease has a fair amount of history to it in that the Ecker's acquired the lease 10 years ago through open competitive bidding. It had been terminated prior to that and was advertised for bid. The Ecker's were determined to be the successful bidder. It was awarded through open bidding. There were a couple of reasons we looked at reducing it lower than the previous term's. First, this particular lease when the Ecker's took it over was in very poor condition. It had extensive weed problems and Mr. Ecker had to invest considerable time and effort in trying to bring this up to a

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productive state. He has farmed that tract for 10 years at little or no profit. The other thing he was able to do that was an advantage for the state is the previous lessee did not participate in the Federal Farm Program, and so there were no base acres associated with that. There were no payments coming in from the associated farm program. Mr. Ecker took some of his own bases from his private property and actually moved them onto the state land so we benefited from that by receiving our share of farm program payments. The department felt that over the previous 10 years he had farmed this in a manner that was not profitable to him in the hopes that down the road he could make a profit on this lease. That's why we ended up setting the rate at what we did.

Mr. McGrath asked was Fulbright the prior lessee?

Mr. Chappell said yes, he was. And like I stated, the management on the previous lease term was very poor.

Ms. McCulloch said its been over a year since I requested the department evaluate the process for grazing, knowing the hang up is the Broadbent case before Judge Sherlock. She asked if the department had a timeline for when that might come about so it can start going through the evaluation process?

Mr. Clinch said the case has been heard but we've not had any timeline from Judge Sherlock. The department is awaiting his decision. As we shared with your staff, we thought it probably wouldn't be valuable to develop a process and/or opinion on that until we get the opinion from the court. That's where we are to date. Mr. Butler have you had any indication of when we'll hear from Judge Sherlock on the Broadbent case?

Tommy Butler, DNRC, said no. There is no indication when the court will issue a ruling.

Lease #4340 – Ayers

Mr. Clinch said this lease currently held by Courtney and Pam Ayers was previously at the minimal rental rate and was bid \$22/AUM and 35% crop share by Mr. William Almy. We held that hearing on April 20th and heard Mr. Ayers and Mr. Almy extensively on this issue. Within the Board's packet is the department's reporting of the findings from the information presented by Mr. Ayers and Mr. Almy. If you read through there you'll see that primarily the information presented by Mr. Ayers was basically a reiteration of the findings we had from our advisory council report. There was no new information, nor was there any particular detailed information about other comparable leases in the county offered by Mr. Ayers for the department to use as evidence. To the contrary, Mr. Almy, who appeared as the high bidder, gave a variety of information about other leases that he either participated in or leases that he knew about. Frankly, evaluating the information presented by the two individuals as well as the statistical information the department had in its files about private lease rates available, and the competitive bid rates on other state lands led the department to the conclusion that is in the recommendation.

Mr. Brown asked what was the department's recommendation?

Mr. Clinch said the recommendation is to set the grazing rental rate at \$13.30/AUM and to maintain the high bid of 35% crop share on the agricultural portion.

Courtney Ayers, lessee, handed out his notes for the Board to review before he spoke to them.

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Mr. Clinch addressed Mr. Ayers and said this lease has previously been issued to you at the minimum, which meant the grazing was at about \$5/AUM and the crop share was at 25%. Mr. Almy's bid is for \$22/AUM and 35% crop share. The department's recommendation is to set the grazing rate at \$13.30/AUM and to maintain the crop share at the high bid of 35%. For purposes of today's discussion, are you contesting both of those or one more than the other? Just so we understand exactly what your conflict is here.

Mr. Ayers said I don't have a problem with the 35% so much as being locked into \$16/acre if this ground doesn't produce anything. If we don't take anything off of this ground, we've just bought something for nothing. We're not in the habit of making deals that don't stand on themselves. At \$16/acre paying for that in Eastern Montana on hay ground, there will be some years where we won't hay that ground at all. We've owned this ranch now for three years, but we haven't done anything with it. We haven't taken any money off of the agricultural acres. As a matter of fact, we've spent a lot of money re-seeding the alfalfa so there would be an opportunity to take a percentage off of it and give the state a percentage. I just have a problem paying for something that we might not get. On the grazing end of it, this letter explains here, I don't feel like this was a valid bid to put us way above the county average. I feel like we are getting penalized and I am not sure why. I have some issues with the way this bid was even accepted or presented. I think there were some motives here that maybe don't pertain to this particular hearing but they are issues to me. They explain why I am here.

Lt. Governor Ohs asked how Mr. Clinch arrived at his recommendation.

Mr. Clinch said these hearings are an hour long. We start out with allowing the lessee to present evidence into the record about the rates. Having done hundreds of these they take on a wide variety of forms, but for the most part, we hear from the lessees about the prevailing rate of comparable leases in that community. We hear about rentals down the street, other rentals with other entities, and that information gets entered into the record and forms the basis of what community standards are for similar type leases. Just to give an example, the department hears about a lease with an adjacent neighbor on two sections of land and its for \$14/AUM, and we also learn in that case that person also provides the fencing, the salt, or a variety of things. Over the course of one hour, there is adequate opportunity for the record to be loaded with lots of real case examples of similar leases in that area. In cases where the high bidder shows up, we hear the contrary. We hear about leases the high bidder has where because of times of high market of cattle or shortage of grass they may transport cattle 100 miles away and they are still paying \$12, \$14, or \$16, all kinds of examples of what they're paying. We have before us statistics that we've gathered from the Agricultural Statistics Department showing the average rental is for an AUM statewide as well as what all the other competitive bids on state land within that county are. So we have a variety of information that form the record. In addition, we hear from the lessee and the high bidder about special circumstances that may revolve around this particular lease. We hear everything from weed problems to recreational problems to lack of water or maybe to the availability of water. It ends up being a wide variety of specific circumstances that we take into consideration. After the week of competitive bid hearings are finished, we sit down as a team and digest the information and make the best recommendation we can taking all the information into consideration as well as our fiduciary responsibility. In this particular case at this particular hearing, Mr. Ayers presented information he knew that private leases were \$10-\$12 per head for grazing of yearlings and \$15-\$20 for cow/calf pairs. When Mr. Almy appeared, he provided information on leases that he had or knew of which provided another bit of information. When we take that information together with the statistics and with the facts of this particular case, I made a recommendation of \$13.30/AUM as being the appropriate rental rate. Mr. Ayers has handed out a letter to the Board where he talked about a long standing dispute between him and the

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high bidder. It is interesting but I was unaware of any of this during the bid hearing. Commonly, during competitive bid hearings, we hear quite a bit about neighborly disputes. And often we find that sometimes they are at the root of it, but frankly, it doesn't change the facts of the case in terms of determining the value of the tract.

Mr. Ayers said a lot of emphasis has been put on Mr. Almy's worksheet he presented, if you add these figures up, both of his proposals at this hearing are less than what his competitive bid was. I don't know if that is acceptable or not. They are several hundred dollars less than what he actually bid. What are we using for the real world? Something has to be invalid someplace. You can't send in a bid and then come to a meeting and offer two more that are less than the competitive bid. I think there are some legal issues here as to what is the real bid. If his competitive bid was the real bid, this piece of paper that he presented is not worth a darn thing because it is not what he presented in the competitive bid. There is no basis to use that as the foundation for us even having to be here to address the competitive bid. I have another issue that I think really is one of the main motives. Mr. Almy has feed lots above this state land and these feed lots dump a lot of waste on this state tract. I think that this is another issue that was the motive behind him bidding against us. If he controls the state land he doesn't have to worry about us making an issue out of a dumping ground for his feed lots. I've asked the state to do an investigation on this.

Mr. Clinch said there is one thing I'd like to bring to the Board's attention. The MAPA rules clearly delineate that the time for presentation of evidence is during the hearing that I conducted. This issue was not brought up or presented during the hearing nor was the handout he gave to you. While the Board may look at it, it is probably inappropriate and out of order to open the record and add more evidence to it.

Mr. Butler said even though this is not a MAPA proceeding we explained each step, both prior to the hearing and post-hearing, that all evidence was to be presented during that one hour hearing. They could then present additional arguments to the Board, but additional evidence cannot be presented into the record.

Mr. Clinch said to clarify, Mr. Ayer's has asked exactly what is the bid. The bid is the actual bid paper that we discussed. Any additional discussion that the high bidder or the lessee make doesn't necessarily have to correspond 100% with what they bid. It is just an attempt on their part to provide evidence as to how they got to, or what the reason is, behind their high bid. I am not aware of the point of contention where you're saying Mr. Almy's presentation and spreadsheets don't add up to the same amount of his bid, and I don't think there is a requirement where it has to. He presented a bid, that is the bid that is in the record. The other information is just additional information presented to try to make the case.

Mr. Ayers said he talked to Kevin Chappell about the feed lot issue and it was agreed that at the hearing it was not the time to bring this up. We had to deal with the three issues that he sent in his letter. I did feel the feed lot was an issue, but I didn't bring it up under his recommendation.

Mr. Clinch said we can certainly deal with that issue or any other issue outside of this hearing. If there is an issue with Mr. Almy having runoff from this feed lot that is having an adverse affect to your lessee rights, we're more than glad to look into that and take care of it. I am not sure, you said there are other disposal of feed lot materials onto the state tract, or whatever those issues are, if you contact the local DNRC land use specialist, I assure you we will look into it and resolve that.

Mr. Ayers said I've done that. Of those three things, one was that if there would be a damage done to the tract, and I feel like this is damage being done to the tract, whether the competitive bid is valid or not, or

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should even be considered at the hearing. And when you dump a bunch of feed lot on it this does go to the state waters too. It goes into O'Fallon Creek. That's damage to the tract. We have the lease on that, am I going to be held responsible for cleaning up somebody else's mess? I shouldn't be. But the state shouldn't have to clean up somebody else's mess either. This should be stopped. It should be corrected. I think it is a big motive for the competitive bids. That is part of the reason we're here right now, to have him come to the meeting and present other what he calls reasonable leases that are considerably less than the state land that he is competitive with. It looks to me like this is not even legitimate, we shouldn't be here at all. We shouldn't be wasting my money and the taxpayer's money on issues like this, this should have been thrown out.

William Almy, high bidder, displayed a map of the area in question and went through it to give the Board a better understanding of where his ranch lies in conjunction to the state tract. He said in the last few years we have chosen to start calving a little earlier, we have increased our cows by a third, and consequently we have to put the calves in smaller adjacent pastures with the mothers because we're running short of room. We looked to this tract of state land which is .38 miles from my land. I can use the county road for access and come into the corner of the pasture. It is extremely valuable to us to be able to put cows/calves in there. We would trailer them in and out. He handed out an economic perspective of his operation. Today we are leasing about 6,000 acres of land and we are paying \$4.39/acre per year. If there is any hay produced on that land, 40% goes to the owner and 60% comes to us. If haying is not feasible, if it is dry which it has been, we can graze the hay land and we pay a \$6/acre surcharge. That's as close as I can come to a comparative situation about AUM, dollars spent, etc. Applying that first formula to a dry year you'll see that the 160 acres becomes 78.80, the 51.9 acres grazing situation becomes 3.11, total amount. The value becomes \$1240 income to the state trust fund on a dry year basis. If in fact we had a normal year, that would change slightly and that would put you back to \$1457 state share of the ground. This is a decision on our part. We have no issue with anybody involved here, we have more cattle than we have had before. We have the need to put the cow/calves out and we think this is a reasonable bid.

Mr. Clinch said in Mr. Almy's presentation he is talking about dollars-per-acre and it is important for the Board to understand that in this particular geographic area in a dryland scenario, there are four acres to a single AUM. So the \$4.39/AUM figure equates to somewhere around \$16/AUM rate. This information is the same information Mr. Almy presented at the hearing and it provided the best information we had about comparable rates in the community. We took this information in context with the other and came up with the recommendation before the Board today.

Mr. Ayers said we are making a long term commitment to a lease.

Lt. Governor Ohs said the Board is clear on this issue. The lease rate has been set by the department and Mr. Ayers is contesting that rate and where we are is to approve or disapprove the rate set by the department.

Motion was made by Mr. McGrath to approve the directors recommendation in Lease #4340. seconded by Ms. McCulloch. Motion carried unanimously.

Ms. McCulloch said I wanted to make a comment to Mr. Ayers and also to Mr. Almy. We've had a few conversations at the Board about grazing rights. About a year ago, because I was concerned about things, I asked for an evaluation of grazing rights to see if we need to look at anything different in how we do business at the Board and DNRC and also to see if there is any need for legislation that needs to go before

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the 2005 legislature. We have a case before Judge Sherlock right now that prohibits us from getting into that. But it is very difficult when hearings have been done on site for us to come in as a Board and we hear all of those hearings. Please know that as soon as the Broadbent case is settled before Judge Sherlock in District Court in Helena we will be evaluating the process of grazing bids in Montana.

Mr. Victor Demaio asked is there any reason why the case would continue if there is a problem in what the decision would develop into? Shouldn't that be something that should be brought to the Judge's attention and maybe put on hold. If it is something being decided by the Judge and it's a problem with our legislation, shouldn't that be something that should be kicked back to the legislators?

Mr. Clinch said your question is, since there is an issue before the court maybe we should just put this whole process on hold and not implement the competitive bid process and the answer is just the contrary. Until we get a decision from the court that tells us to do something different, the law stands as it is. And that is precisely what we're doing. We're implementing the preference right, the competitive bid hearings, and this process today. But Superintendent McCulloch has said when Judge Sherlock rules, if there is something he rules that says we need to change the process, she said we will convene a committee and develop legislation or whatever it takes to change the process to be consistent with the court's decision.

Mr. Demaio said there is a problem somewhere between the legislation and this case.

Mr. Clinch said right. We don't know how the judge will rule. If he rules in something that has bearing on it then that will be the law of the land as of that time and perhaps there needs to be some clarifying language. Until we get that rule from the judge, we don't have any action to take.

Mr. Demaio asked isn't the judge's ruling based on legislation we have in the state?

Mr. Clinch said the judge is hearing a case that alleges that there are some things wrong with the current statutory direction.

Lease #4674 – Victor Demaio

Mr. Clinch said this lease is in Musselshell County and is 310 acres of straight grazing land. It was bid to \$13/AUM. Previously it was at the minimum. Mr. Victor Demaio is the current lessee, he appeared before us at the hearing. We also had a letter from the high bidder, Mr. Lynn Godfrey, which we referenced in the record. In the discussion with Mr. Demaio his main testimony was that when he looked around Musselshell County the vast majority of the state leases in that county were at the minimum rate. Therefore, he thought that it was punitive that he should have to pay something above that when in fact the average state lease in Musselshell County was at the minimum amount. As you are aware, while that may be the case, that is not the positive in terms of the department's decision. Again, we were interested in information about what is the true value of that lease competitively. We had a rather compelling letter from Mr. Godfrey who is a past constructor of range management and operates a cow operation in the nearby area. He provided examples of two leases he had that were in excess of \$13/AUM. After having had the one hour hearing with Mr. Demaio, he did not present any convincing evidence to me that \$13 was above the community standard for a competitive lease. I'll grant him the point that it is higher than the average unbid lease in Musselshell County, but that is not the decision before me. He said we did have a few state leases competitively bid in Musselshell County and the average of those was a little over \$11 and the average private lease in that county was \$15.20. With the lack of evidence being presented to

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the contrary by Mr. Demaio, and a credible letter by the high bidder, I just could not find any defensible reason to reduce the high bid of \$13/AUM.

Mr. Demaio said I am not opposed to paying more than what the average state piece was. At this time I would like to request a copy of the tape from the hearing. I'd like to read first a letter given by Mr. Godfrey, which if you notice he doesn't have a date on it. He is a teacher who has retired now after 31 years and feels he should get into ranching in a bigger scale. I received this letter when I went to the hearing where they said maybe we should present this letter to you first before you address us on defending your reasons for feeling this is out of line, the \$13/AUM. He has made some pretty nasty accusations and I asked the hearing members if they wanted to come down to the state piece. He says that I painted all the trees there orange along the state piece on the county road, that is not true. There was one tree sprayed orange and that was in 1993 – 1994. Since then its been sprayed black because I didn't have any blue paint to put on it. The directive came down between 1993 and 1994 that if you had any trees on the state land, spray them orange with blue to designate a state piece. These are some of the things he's got in this letter. He has made this a very negative outlook on me. I've got letters from the state individuals in the area that say my stewardship on my piece of ground was very commendable. The report I just received after the hearing is upsetting as well. They state that the state land averages in the county are \$11.11/AUM and goes up to private leases which are \$15-\$20/AUM. At the hearing I brought something to their attention that I felt should be considered when evaluating the areas on their rates for different types of land. Our area is down below and they are using mine as a guideline at \$18/AUM, for an area that doesn't have any water. The only water it gets is the supply on my sections if I have cattle up on it. The areas we have down below are sub-irrigated and even during the years of drought we had, on my private pieces of ground I had lush grass growing on it. This is one of the things I had based this on, and they claim that I had no evidence to present, this is very disturbing. Mr. Godfrey states in his letter, "...agree that the land is in good condition and well taken care of whether Victor gets the lease or I do, the main thing is schools are having a serious budget problem and the lease is easily worth \$13/AUM according to local standards." I did bring this up at the hearing, that I didn't believe that ranchers in the state should be helping any more to bail the budgeting problem that the education department has. That was to bring to their attention that, hey, we got a pattern going here that looks like it is a little bit out of hand to have a teacher make a statement like this, and I thought it was totally out of line. That was the basis of what he put in his letter that I felt was what he thought. Now, they are using his professional opinion as basing that. They are saying this is the evidence that was produced. I am saying, wait a minute. First of all, the man is biased. He is competing against me. Go out and get a professional if you want to. The state, during their last six years of drought has come up with a thing that they added 10 more animal units to this same piece of state land, it went from 70 to 80, which I felt was unusual during six years of drought to say it could handle another 10 pairs. The fact that they said I did not present any evidence was upsetting to me, and I think the tape supports that I did bring up the facts that the state piece does not have the same benefits. The average state pieces in our county is 152, and I had a little bit of a time getting that copy from them, all they wanted to do was show me there is only eight pieces that had been over bid and they use this as an average in their report now. The \$11 and \$15 they are talking about that's only eight sections or eight leases that are actually being leased at the rates they quote, \$11/AUM. The state-county bid averages, the package they sent me was 152 ranchers and their average is under \$6/AUM for 2004. If the Board cares to, they can get a copy of those 152 state leases from the director and it will show that was what they had on the bottom of their sheet. I just felt that this is a little ambiguous. It is only talking about the eight pieces that were high bid. The director mentioned, hypothetically, to me at the hearing how would you feel if it was something like \$10/AUM? I said, well, they say in here they want my rate to go back down to where it was, and I said that was not it, I said I would like to see if you want to make a realistic competitive bid it would be somewhere between the

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basic and the \$13/AUM, and that would be acceptable to me. I felt that would be fair and honest on my part. That is in the tape as well, but they're saying I didn't present any of that. My argument was quoted that I felt it should be brought down to the basic bid price, and that is not what I had said at the hearing. The other point I want to bring out is the fact that I think the forms they have are a little bit off. There are three questions there, I was coming in basically because I thought the price was totally out of line from somebody jumping to better than double the price and the place doesn't have water on it. I used mine as a comparison and said if you people are going to be using different basis of how you pick out your rentals on your state pieces, than I would recommend that if a state piece has a creek running through it, has sub-irrigation, has rich grass and people putting their cattle on there are going to get a little more weight than a piece that's 300 feet above any moisture and doesn't have any water on it. You can't base the same rates. You can't use the same similar comparison, that's fact. In reference to the questions, I still do not have the knowledge to answer two of three questions you have for appeals. One question was related to the fact that I did not offer any testimony to show that it impairs it's long term productivity. I can't look into the future on that, drought and every other condition has to have a varied factor. Its something on the form that nobody could answer, that is looking in to the future. The other one is doing damage to the tract. Who can say what an individual will do to a tract until they actually get it. Those two questions on the form are out of line, I believe. The department is saying that I didn't bring any defense up. But if the tape was reviewed it would show that I did put some very substantial reasoning into why I felt it should come down. I do suggest in my letter that maybe we don't need this hearing committee, maybe you should just go to the state agricultural divisions of the education division and get their opinion on what the rates should be on different cattle leasing. I am being a little bit derogatory on this, but I am trying to point out reality. If we were to take this type of operation and very rich people can come in here and say I want that piece of ground whether its near my place or not and I'm going to bid \$100/AUM and that's what they are going to get it for because they are high bidder. I think this is something that should be looked at legislatively. We are an agricultural state, and if we can't keep agriculture alive, and you can't keep it alive without some state pieces going along with it, maybe some kind of evaluation should be taken into consideration with the legislature on some type of better guidelines on competitive bidding. I did point out that one thing not taken into consideration for state tracts is we have rentals, fees to pay from electricity to fuel to insurance to taxes that is not on the state pieces. This is the reason why our area is much higher than the state piece. But at the same time, we should not be paying to support the budgets of the state when they are in a major problem. I would like to see the Board hold off on making a decision on this until I get my tape and review and evaluate it in regards to their report.

Motion was made by Mr. McGrath to approve the director's recommendation on lease #4674. Seconded by Mr. Morrison. Motion carried unanimously.

504-2 HAPPY VALLEY TIMBER SALE

This proposed timber sale is located approximately seven miles north of Kalispell, and proposes to harvest from 443 acres consisting of four harvest units. The projected volume is 24,554 tons, or 3,331 MBF. The purpose is to create a healthy and vigorous forest and to lessen the potential for catastrophic wildfires near residential areas. Access is across existing roads. Approximately 3.4 miles of road improvement is required. Upon completion of the sale, all roads deemed unnecessary for management and in poor locations will be permanently closed and revegetated. There are no historical or cultural areas identified. Public involvement was solicited through legal notices in newspapers and letters to adjacent landowners and interested parties. No significant environmental impacts will result from this harvest

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operation. This sale will generate approximately \$574,457.00 in revenue, and an additional Forest Improvement Fee of \$9.02/ton will be charged.

504-3 TYLER CREEK TIMBER SALE

This proposed timber sale is located 13 miles west of Drummond and involves the harvest of 391 acres consisting of seven harvest units. The projected volume is 12, 458 tons, 1,755 MBF, and the purpose is to create historical stand conditions and improve vigor. Access is across existing roads with approximately 2.76 miles of road construction along with six miles of road reconditioning required. Upon completion of the sale, all new roads and reconditioned areas will be grass seeded and slashed. There are no historical or cultural areas identified. Public involvement was solicited through legal notices in newspapers and letters to adjacent landowners, interested parties and lessees. No significant environmental impacts will result from this harvest operation. This sale will generate approximately \$264,109.60 in revenue, and an additional Forest Improvement Fee of \$6.72/ton will be charged.

504-4 BIG PRAIRIE TIMBER SALE

This proposed sale is located 22 miles north of Plains, and involves the harvest of timber from 791 acres consisting of seven harvest units. The projected volume is 37,899 tons, or 5,338 MBF. The purpose is to treat a rapidly expanding insect and disease outbreak using a shelterwood harvest. Access is across existing roads with approximately 1.1 miles of road construction required. All roads will be closed to all uses upon completion of the sale. The 4.7 miles of road reconstruction will be closed and 7.5 miles of road will permanently be obliterated or used for logging purposes and then reclaimed and abandoned at the close of the sale. There are no historical or cultural areas identified. Public involvement was solicited through legal notices in newspapers and letters to adjacent landowners and interested parties. No significant environmental impacts will result from this harvest operation. The projected revenue is \$894,416.40, with an additional Forest Improvement Fee of \$9.37/ton to be charged.

The Board addressed all three proposed timber sales together.

Motion was made by Ms. McCulloch to approve the Happy Valley, Tyler Creek, and Big Prairie Timber Sales. Seconded simultaneously by Mr. Brown and Mr. Morrison. Motion carried unanimously.

504-5 UPDATE ON WHITEFISH STATE LANDS ADVISORY COMMITTEE

Jeanne Holmgren, DNRC, said the department engaged in a neighborhood planning process for approximately 13,000 acres in the Whitefish area. We are doing this to look at those lands to develop a neighborhood plan to amend the existing growth policies. We initiated a public process which evolved into an advisory committee, and was approved by this Land Board in October, 2003, and also approved a charter at that time. The results will be a final product that the DNRC can use to make an amendment to the existing growth policies of the community.

Andy Feury, Mayor of Whitefish, said about a year ago the first public meeting was held in the community of Whitefish with regard to the state's plan to come up with a land use plan for these 13,000 acres. In my eleven years of involvement with local government, I don't think I've seen a more widely attended public meeting in that community, I don't think I've ever seen a more uniformly-held point of view by a large group of people. That group was between 300 – 400 people, and everybody pretty much

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has the same thing to say. Out of that process through the summer, a lot of us were concerned that it would evolve and wouldn't necessarily produce a plan that was palatable to the local community and would ultimately end up with problems for the state and the community. Through that process we came to the Board last summer and asked that a local advisory committee be established through a charter with the Land Board and through that advisory committee we'd come up with a plan. Now, when that charter was drafted that plan was supposed to be delivered this month, that's why we're here today. We're also here to give you an update on where we are, give you a plan where we're going, and give you a firm date and ask for an extension to allow us to finish that plan and give you something that we hope works for the citizens of the state and certainly work for our local community. After that charter was developed, the first thing that had to happen was to establish the advisory committee. Myself and Flathead County Commissioner Gary Hall solicited applications and had 50-60 people apply. We chose a committee of about 13 people. Out of those 13, we had mountain bikers, loggers, snowmobilers, lease holders, and a local credit union president. A lot of diverse people who all had concerns about what happens on those lands. Even though we have a lot of different political opinion, it was a good way for us to sit down and go through a lot of the issues and develop a plan that works for all of us. That's more easily said than done, and that's why we are here asking for an extension so we can complete that plan. Early on, part of this process began because there was mistrust between the community and the DNRC, and I think when the committee first got established that mistrust continued. It took us a couple of months to get through that and that process began in November. I am happy to say all of those issues are behind us. We've produced a good resource document in draft form. It was produced with the help of the first consultant that DNRC hired, Janet Cornish of Butte. We have held four public meetings to date, with a lot of detailed input on all of the individual areas. We've developed our general goals and policies in a draft form. Now we have a framework under which we can begin to analyze the things we look at. I think we have a good overall outline for what that plan will look like when it is completed. I fully expect when that plan is finished that there will be elements the DNRC is not comfortable with, that the local community is not comfortable with, and I suspect the Land Board will also find elements it is not comfortable with. To get to that point, we have a lot of work ahead of us. We'd like to be able to deliver a plan to the Board on October 18, 2004, at the regularly scheduled Land Board meeting. It will entail a lot of work on our part and we will need a lot of help. We looked around and tried to find an independent voice to help us that has experience in these types of issues and can go ahead and facilitate us now that we have our basic framework in place to put that plan together and present to the Board in draft form. We've contacted, and have been in the process of negotiating a contract, with a company out of Colorado, Conservation Partners, Marty Zeller is head of that firm. They do this precise kind of work throughout the west, working specifically with trust lands and the local community and a state managing entity, to put together a plan that will be flexible enough to provide revenue that obviously the trust needs, and also to provide the predictability in that plan for the local community so they don't feel they are getting sold down the road. If they could have something they can plan for, something they can understand will not impact them in a negative way, and will continue to allow them to use those lands in the manner in which they have become accustomed to. All that being said, it doesn't come without a price tag. The cost will be somewhere between \$40,000 and \$50,000. We are currently in the process of raising that money locally through donations which we've done throughout this process. We've met with the department and they have promised to help us with some of that funding.

Mr. Morrison thanked Mr. Feury for his leadership in this matter and also thanked the other members of the committee. He said he had the privilege of attending the Thursday night meeting a week or two ago and he could tell that the folks working together in Whitefish are really focused on this project and approaching it in a way that takes into consideration the various interests in what is the biggest land use issue in Whitefish. I would just like to add my support to the suggestion of the October extension and I

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can tell from what I have observed that the committee is moving in the direction of getting something constructive completed by that time, I am confident that you will use that time wisely.

Mr. Feury added that the DNRC local office we've been working with are also supportive of that extension as is the people in the DNRC headquarters office. We wouldn't have come to the Board without their cooperation and endorsement.

Mr. Morrison said he wanted to thank the department for its support and cooperation in this because I know it has been an unusual dynamic. But everybody has been working together very well. I look forward to your results and conclusions.

504-6 RIGHTS-OF-WAY APPLICATIONS

Mr. Clinch said this month's package is a collection of utility and corridor rights-of-way requests with the exception of #12404, preliminary approval for Mr. Doug Boutilier. He proposed the Board set aside the easement request for #12404 and act on the remaining requests. This month's package includes #11579 from Van Nice Angus Ranch, an amendment for an access road; #12377, 12378, 12379, 12380, 12381, 12382, 12383, 12384, 12385, and 12386 are from Hill County Electric Co-op for either buried or overhead electric distribution lines; #12425, 12426, 12427, 12428, 12429, 12430, 12431, 12432, 12433, 12434, 12435, 12436, 12437, 12438, 12439, 12440, 12441, 12443, and 12444 are from Nemont Telephone Co-op for buried telephone distribution lines; #12445 is from James and Connie Capp for private access road to single family residence; #12446 and 12447 are from Shilo and Karen Capp for private access road to single family residence; #12454, 12455, 12457, 12458, 12459, 12460, 12461, 12462, and 12456 are from Marias River Electric Co-op for overhead electric distribution lines; #12465 is from Lewis CRT for a private access road for ranch management; #12477 is from Mid-Rivers Telephone Co-op for buried fiber optic copper and coaxial cable; #12479 is from the Town of Stanford for municipal water well and associated appurtenances.

Mr. McGrath said on the Van Nice Ranch in Silver Star, we had issues on that earlier. Has the access for hunters been worked out or do we still have an issue down there?

Mr. Clinch replied we resolved that issue and this amendment doesn't affect that at all.

Motion was made by Mr. Morrison to adopt the rights-of-way application package with the exception of #12404, Doug Boutilier. Seconded by Ms. McCulloch. Motion carried unanimously.

Application #12404, Doug Boutilier

This is a request for preliminary approval to proceed on application #12404, Doug Boutilier. Mr. Clinch said last month during the public comment period Mr. Boutilier came forward and shared his frustration with his involvement with the department. As of that time, the department had not proceeded with either a denial or recommendation for approval on Mr. Boutilier's request for an easement. What I told the Board following Mr. Boutilier's testimony was that I would go back and direct the department to carryout more conversations with Mr. Boutilier and see if we could come to resolution on some of the contentious items, and that I would report back to the Board this month. Since last month's meeting, a number of issues have come to light. We had conversations with the engineering firm that is doing the design of the proposed road for Mr. Boutilier. They provided documentation that a right-of-way to the property in

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question across the current Boutilier residence was not only improper, it had some safety hazards. It would cause conflicts to an existing water well and sewer system that we were unaware of. Having had that discussion, it resolves some issues in the department's mind about whether it was appropriate to entertain an access road to the proposed Boutilier property with the current department policy relative to private driveways. The engineer's explanation cleared up that issue. Since that time, we have met on-site and had numerous discussions with Mr. Boutilier about the type of road, the location, the standard, payments, and the location of the parking lot. As you'll remember, one of the issues was to establish a parking area for the public that wishes to access this or other public lands to the south. We've met with parties concerned about that, and staff is trying to digest all of that information and put it into a packet that we can bring back to you next month relative to the survey and the appraisal, and have all of those things worked out. That's the status of where we are to date. Mr. Clinch requested that the Board, through a motion, grant preliminary approval for the department to continue. He said since the discussion last month, I wanted to let you know where we were on this issue. It would be appropriate to have Board action and also to provide a forum whereby the applicant and the public would be welcome to comment.

Greg Jackson, Helena, said I am a resident of Lombardy Drive, a part of the neighborhood that would be impacted by this easement. Lombardy Drive is located across from State Nursery and it is a quiet neighborhood of a few private residences on a cul-de-sac road that has virtually no traffic. I am opposed to this easement across the state land, which is undeveloped state land. This land is a border to the private residences on Lombardy Drive. In reviewing the statutes in regard to the issuance of an easement, it does not appear that there would be any necessity for the granting of this easement. In addition, looking at the policy for the granting of private driveways, or easements, by the state, this simply would not meet the criteria required by that policy. One of the things that is of great concern to me and others in the neighborhood is the traffic situation as it could develop in the event this easement was grated across state land to the Boutilier property. We understand presently that this application is to access one parcel of land which is carved out from approximately 77 acres that Mr. Boutilier owns. However, if this easement were granted, it could feasibly open up this land to development. The problem we have in the area as evidenced by the Blue Cloud area, the Broadwater area, and now the development of the Jerry Strong property further out on Highway 12 West, is that this land is prime land for development. In the event this easement were granted to this one parcel, it would essentially open up the remainder of this property for development in the future. This would greatly impact the traffic situation in this area. As I indicated, it is a cul-de-sac and all the traffic dead ends on Lombardy. This access would go through Lombardy, to the end of Lombardy across the state land and this roadway would be in full view of those residents that now border the undeveloped state land. It would impact not only the aesthetic value, it would impact the appraised values of the property, and would, if granted, give rise to further traffic with the potential that there would be a greater traffic flow in the future. Simply stated, I don't see there is the necessity for the granting of this easement to property that was purchased with the full knowledge that there was no access available to this property. For those reasons, I oppose this.

Mr. Morrison said what is it that you understand these criteria to be? And why do you think this doesn't comply?

Mr. Jackson said one of the criteria is whether it would diminish rather than enhance the school trust asset. I believe that the access and public traffic across state land which is presently undeveloped would do nothing to enhance the state trust value. The other criteria is whether the applicant already has legal access. He has a residence presently on the 77 acres, there is a driveway that accesses that. I understand there may be difficulties in terms of putting a further access road from where his driveway ends to the land he has gifted to his daughter, but certainly he has carved out a parcel of his own land which he wants

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to develop. It seems that it would be equally apropos for a roadway to cross his own property rather than the state trust property. The other criteria is whether the construction of a road across his own property has been demonstrated to be impossible without irreparable injury to the environment. To date I have seen nothing that would indicate that that criteria has been met. Finally, the policy indicates that in situations where the applicant does not have legal access to their property and the property interest was acquired without legal access, applications are discouraged and approval will be withheld except in extraordinary circumstances. That's exactly what happened here. The property was purchased with full knowledge that there was no access to this parcel, at least this corner of the parcel, to which he seeks an easement. Access has already been developed and provided by Mr. Boutilier to his property in general. It certainly seems the criteria policy of the Board in terms of granting driveway easements has not been met here in any of the particulars.

Mr. Clinch said for the record, if the Board grants preliminary approval to proceed in the department scoping process, these are the kinds of comments we anticipate and will craft responses to those looking at the various statutes and policies. We don't feel the necessity to respond to Mr. Jackson's questions now, but in the process that we envision, every one of those types of questions will be answered in a document.

Doug Boutilier, Helena, said I was here last month, and in reference to some of the things Mr. Jackson stated, I've got two engineering firms say it is impossible to cross my property from the west going east and get to the land I'm giving my daughter. I have had engineers up there 5-6 times, I've spend a lot of money showing that over and over. There is no way. Secondly, as far as developing it for further use, I've been talking to someone already about putting a conservation easement on it, at the last meeting I said it is for one house only, not for any development. I am not doing this for any development purposes. I am going to put a conservation easement on my property to prove that. It will be open space. As far as traffic, it is state land. They also bought it knowing it was state land and there should be access to that land. At some point there needs to be a decision made. At the last meeting it was going to be at this month's agenda. Now we're going to put it on the June agenda. I would ask that you consider making a decision and we can figure out the details later. I've got the appraisal done, I paid for that, I would still prefer the road along the fence line. If DNRC thinks it is better to go elsewhere, that's fine. But at some point we've got to make a decision here. My daughter is trying to build a house. As far as access, a year ago I was told if I couldn't get access through a private individual I should go through this process to apply for access through the state. So I disagree with what Mr. Jackson said about the access problem. I would appreciate it if we could have a vote and move forward on this.

Lt. Governor Ohs said Mr. Clinch would you make sure that I have in my mind what the issues are at hand here before this Board?

Mr. Clinch said the first witness, Mr. Jackson, raised some issues as to whether he thinks the Board even has authority and while he quoted the private driveway policy, I would remind this Board that that is it's policy and it has the discretion to deviate from it at will. It is merely a guiding document. I believe the information the engineering firms has presented about the problems with trying to construct a road from Mr. Boutilier's access to this property more than adequately give justification as the policy allows for the Board to waive the fact that there is other access from the other side and therefore allows access across this. Contrary to what Mr. Jackson said about diminishing the state value, the department thinks that a properly located road to the proper standard that would provide access to the lower portion of the state tract would, in fact, enhance the value of that tract in the future should the state choose to do some other development activity. I feel there is latitude for the Board to proceed. The reason that we're asking for

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preliminary approval rather than direct approval at this time is because we know there is some level of controversy, we have tried to have contacts with public interest groups that are interested in public access. We want to make sure that prior to coming before the Board and asking for approval, we have a specific location of where the road is going to be because that may play a critical part in some of the adjacent neighbors, as to how close that road is located to the property line and to their own personal property. We think it is fairly critical to have those totally delineated and to come before you with a total package. We also think it is appropriate to have gone through a public process where concerns can be voiced and considered, and that we have knowledge of that before the Board makes its decision. That's the process we envision. I apologize to Mr. Boutilier that this has taken over a year but I think it is in the best interest of the department and to Mr. Boutilier to proceed in a way that is within the parameters of the law and is defensible in the event we come before the Board for the decision next month that is not endorsed fully by all parties.

Motion was made by Mr. McGrath to give preliminary approval to the right-of-way application. Seconded by Mr. Morrison. Motion carried unanimously. (Mr. Brown not available for the vote).

Mr. McGrath said he thinks there is a couple of other issues that should be discussed, he knows the department will do that as part of its scoping process, but this has the potential for being a win-win situation. It does provide the potential to have access to this state area which then will provide potential access to the entire Mount Helena trail system. That alone is a very significant enhancement of the value of the state land. He would assume one of the discussions had by the department with the people in the neighborhood and interested parties will be the potential of the parking pad. Right now there is no way to reasonably park out in that area off Lombardy Drive. So what I am hoping gets developed is not only this access road but a parking area that then provides access to the public.

Ms. McCulloch said when the department is working on the language for the easement, I am thinking about the concern of one of the neighbors for a possible future development. Does the department look at putting stipulations on the easement as to what exactly it will be used for for 30 years?

Mr. Clinch replied absolutely. That is fairly common, particularly on a contentious issue. I believe there is no disagreement. Mr. Boutilier has made it clear from the beginning that we could put a stipulation on the deed for that easement that restricts it to access to this single residence. That resolves the issue about future subdivision.

Motion to adjourn was made by Mr. Morrison. Seconded by Ms. McCulloch.